A. IDENTITY OF RESPONDING PARTY

Respondent City of Bremerton asks this Court to deny Petitioners William and Natacha Sesko's motion to modify commissioner's ruling.

B. DECISION

The decision at issue is the Supreme Court's Ruling Denying Review of the Court of Appeals, Division II, Order Denying Appellants' Motion to Allow Late Filing of a Notice of Appeal.

C. ISSUE PRESENTED FOR REVIEW

Whether the Supreme Court Commissioner erred in denying review of the Court of Appeals order when the Court of Appeals followed RAP 5.2, RAP 18.8(b), and every reported Washington case in denying the Seskos' motion to allow late filing of their notice of appeal.

D. STATEMENT OF THE CASE

1. Statement of Facts

Appellants William and Natacha Sesko (the Seskos) have been in litigation with the City of Bremerton (the City) in this case for over 10 years. The Seskos have appealed practically every adverse ruling by the trial court, totaling three appeals to the Court of Appeals, not including the case at bar. *See City of Bremerton v. Sesko*, 100 Wn.App. 158, 995 P.2d 1257 (2000); *City of Bremerton v. Sesko*, 116 Wn.App. 1054 (Unpublished Opinion), 2003 WL 1986424 (2003); *City of Bremerton v. Sesko*, 134 Wn.App. 1033, 2006 WL 2329467 (2006) (Unpublished Opinion). Finally, after a bench trial from January 29 through February 1, 2008, the Kitsap County Superior Court resolved all of the remaining issues in favor of the City. Declaration of Mark E. Koontz[1], Exhibit A (Memorandum Opinion).

The prior opinions of the Court of Appeals have recited the relevant facts. Briefly, in 1996 the Seskos owned two parcels of property in Bremerton, one at 3536 Arsenal Way and another at 1701 Pennsylvania Avenue. 100 Wn.App. 158 at 159-160. The City found that the Seskos were operating an

[1] This declaration was submitted to the Court of Appeals in opposition to the Seskos' motion to extend time to allow filing a notice of appeal.

illegal junkyard on each property in violation of city codes, and the City issued cease and desist orders for the two properties. *Id.* at 160. The Seskos ignored them, so the City filed suit in 1997. *Id.* The Kitsap County Superior Court found that both properties were junkyards and were in violation of city codes. *Id.* After a bench trial, the trial court found that the properties constitute a nuisance and ordered the Seskos to abate the nuisance. *Id.* at 161. The Seskos appealed that ruling, and the Court of Appeals affirmed the trial court's decision. *Id.* at 159.

On remand, the City sought clarification of the trial court's orders of abatement to ensure that the City's abatement procedure was sanctioned by the trial court. 116 Wn.App. 1054, 2003 WL 1986424 at 1. The trial court entered orders clarifying the abatement orders and reiterating the City's authority to proceed with the abatement of the nuisance at the Seskos' expense. *Id.* The Seskos appealed these orders. *Id.* The Court of Appeals dismissed the appeal on the basis of collateral estoppel since the orders on clarification merely implemented the original orders of abatement. *Id.*

After the City abated the Seskos' two properties at an expense exceeding $250,000, the City sought a judgment for reimbursement of the cost of abatement less the salvage value of the scrap and junk removed from the property. 134 Wn.App. 1033, 2006 WL 2329467 at 1-2. The Seskos argued that the City did not properly account for the salvage value from the abatement. *Id.* at 1. The trial court found that the Seskos were collaterally estopped from litigating this issue and entered a judgment in favor of the City for the costs of abatement. *Id.* The Seskos appealed. *Id.* The Court of Appeals held that collateral estoppel did not bar the Seskos' litigating whether the City properly accounted for salvage value and remanded the case to the trial court for a hearing on that issue. *Id.* at 6.

2. Procedure Below

From January 29, 2008 until February 1, 2008, the trial court conducted a bench trial on the issue of whether the City properly accounted for the salvage value of the items removed from the Seskos' property. Koontz Declaration, Exhibit A. On February 13, 2008, the trial court entered its Memorandum Opinion finding that the City properly accounted for the salvage value. *Id.*

On February 19, 2008, the City mailed a Notice of Presentation of Judgment to the Seskos' attorney for presentation on March 7, 2008. Koontz Declaration. The Seskos filed no formal response to the notice. *Id.* However, on March 6, 2008, the day before the hearing on the notice of presentation, Alan Middleton, the Seskos' attorney, emailed Mark Koontz, the City's attorney, indicating: 1) that he has received the City's proposed order/judgment, 2) that he has no objection to its entry, 3) that Mr. Koontz may sign the judgment on Mr. Middleton's behalf and present it to the trial court, and 4) that Ms. Sesko and he were evaluating an appeal. Koontz Declaration, Exhibit B.

The next correspondence Mr. Koontz received from Mr. Middleton was on April 9, 2008 when Mr. Koontz received the untimely Notice of Appeal. Koontz Declaration.

On May 19, 2008, the Court of Appeals requested a response from the City, and on June 4, 2008, the City filed and served its response. On June 11, the City received a copy of the Seskos' reply to the City's opposition. On July 1, 2008, the Court of Appeals entered an Order Denying Appellants' Motion to Allow Late Filing of a Notice of Appeal. On July 31, 2008 the City received a copy of the Seskos' Petition for Discretionary Review by the Supreme Court. On August 20, 2008, the City received a letter dated August 19, 2008 from Susan Carlson, Supreme Court Deputy Clerk, stating that the Seskos' petition for review will be treated as a motion for discretionary review under RAP 13.3(c) and RAP 13.5(a).

On October 3, 2008, the Supreme Court Commission filed a Ruling Denying Review. The Seskos filed their Motion to Modify Commissioner's Ruling on November, 4, 2008, which is inexplicably one day after the deadline for filing the motion. *See* RAP 17.8; RAP 18.6(c).

E. ARGUMENT WHY THE SESKOS' MOTION SHOULD BE DENIED

The Seskos seek review of the Court of Appeals' decision denying their motion to file a late notice of appeal. RAP 13.3(c) allows a party to seek review of a Court of Appeals decision as provided in RAP 13.5. RAP 13.5(b) states that the Supreme Court will accept discretionary review of an interlocutory decision of the Court of Appeals under only three circumstances:

(1) If the Court of Appeals has committed an obvious error which would render further proceedings useless; or

(2) If the Court of Appeals has committed probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act; or

(3) If the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a trial court or administrative agency, as to call for the exercise of revisory jurisdiction by the Supreme Court.

RAP 13.5(b).

The Seskos do not identify which circumstance entitles them to discretionary review; they only argue that the Court of Appeals committed error. In fact, the Court of Appeals did not commit obvious or even probable error. It followed the unambiguous rules of appellate procedure and case law to deny the Seskos' motion to extend time.

1. The Court of Appeals followed the rules of appellate procedure and case law in denying the Seskos' motion to extend time.

RAP 5.2(a) states that "a notice of appeal must be filed within 30 days after the entry of the decision of the trial court which the party filing the notice wants reviewed…" RAP 5.2(a)[2]. Only under the most extreme circumstances will this court extend the time for filing a notice of appeal:

> The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal… The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

RAP 18.8(b).

a. The Seskos do not present extraordinary circumstances to justify granting an extension of time.

The Seskos do not present extraordinary circumstances to explain the reason for an untimely filing of the notice of appeal. While the Seskos' attorney, Mr. Middleton, testified he was experiencing personal issues which were "upsetting and distracting", he admitted that the ultimate reason for his failing to file a timely appeal was that he improperly calendared the due date for the notice of appeal when he

[2] The other deadlines for filing do not apply to our case.

received the final order. Middleton Declaration at ¶¶ 10 and 11. Improperly calendaring the deadline for filing a notice of appeal does not meet the standard of "extraordinary circumstances".

In *Beckman v. State Dep't of Social & Health Services*, 102 Wn.App. 687, 11 P.3d 313 (2000), the Court of Appeals denied the State's motion to extend time to file a notice of appeal. One reason for the State's failure to timely file is that it did not have a centralized system for calendaring hearings, but it relied on individual lawyers to calendar hearings. The Court held that this did not constitute "extraordinary circumstances" citing to the reasoning from another case:

> We find nothing in the nature of an event or circumstance so extraordinary in this case as to excuse the neglect of appellant's counsel to provide suitable office procedures to cause the judgment to be brought to counsel's attention once it was delivered into the custody and control of counsel's office. ***It is incumbent upon any attorney to institute internal office procedures sufficient to assure that judgments are properly dealt with once they are delivered into the custody of office personnel subject to the control of counsel. The failure to take necessary steps, to that end, even during periods of unusual circumstances in an attorney's office, is not an acceptable excuse for any resulting failure to obtain personal knowledge of the entry of judgment on the part of counsel***....

Beckman at 696 (emphasis added), quoting *State v. One 1977 Blue Ford Pick-Up Truck*, 447 A.2d 1226 (1982).

The Seskos attempt to distinguish *Beckman* by suggesting that the Seskos' lawyer's erroneous calendaring of the deadline has a lagal significance different from the State's failure to have a proper calendaring procedure. Seskos' Motion at 6. This is a distinction without a difference. The fact is that in both *Beckman* and our case, the lawyers simply failed to properly calendar the deadline. Such an excuse does not rise to the level of extraordinary circumstances.

In *Reichelt v. Raymark Industries*, 52 Wn.App. 763, 764 P.2d 653 (1988), the Court of Appeals denied appellant's motion to extend time when the law firm representing the appellant had one of its two litigation attorneys leave the firm during the 30-day filing period. *Reichelt* at 764. The Court noted that the "rigorous test [for meeting extraordinary circumstances] has rarely been satisfied." *Id.* at 765. In fact, the Court noted that the only instances where extraordinary circumstances had been met were when

the appellant had actually filed the document on time, but it was not filed properly due to procedural defects (i.e. filed in wrong court, filed without a filing fee, and filed timely when calendaring after "amended" judgment). *Id.* The court reasoned:

> In each case, the defective filings were upheld due to "extraordinary circumstances", *i.e.,* circumstances wherein the filing, ***despite reasonable diligence***, was defective due to excusable error or circumstances beyond the party's control. In such a case, the lost opportunity to appeal would constitute a gross miscarriage of justice because of the appellant's ***reasonably diligent conduct***.

Id. at 765-766 (emphasis added), citing Rap 18.8(b).

In our case, apparently Mr. Middleton was the only person in his firm who was responsible for calendaring deadlines in this case. He knew of the date of the presentation of the judgment, had no objection to it and decided not to attend the presentation. Koontz Declaration, Exhibit B. The City delivered a copy of the Judgment to Mr. Middleton on the Monday after the Friday it was entered even though the City had no obligation to do so. *Beckman* at 695. Mr. Middleton even contemplated an appeal prior to formal entry of the judgment. Koontz Declaration, Exhibit B. He had 30 days after the judgment was entered to file the notice of appeal. He could have filed the notice on any one of those days, but he chose to wait until after his firm retreat and after he moved offices. His conduct was not "reasonably diligent conduct" to justify extending time to file a notice of appeal.

b. Denying the Seskos' motion would not prevent a gross miscarriage of justice.

In addition to proving "extraordinary circumstances", the Seskos must also prove that extending time would prevent a gross miscarriage of justice. RAP 18.8(b). It is clear from the numerous appeals in this case and the extensive hearings before the trial court that over the last ten years, the Seskos have had their day in court. The only issue the Seskos are seeking review on appeal is to be the applicability of the execution statute to our case. This issue was presented to the Court of Appeals in the most recent *Sesko* appeal, and the court remanded it to the trial court for determination of that issue. 134 Wn.App. 1033, 2006 WL 2329467 at 5. In fact, that is precisely what the trial court did. Both parties briefed the issue,

and the trial court specifically addressed it in is Memorandum Opinion. Koontz Declaration, Exhibit A. That issue has been thoroughly litigated. The Court of Appeals had an opportunity to address the issue and declined, and the trial court considered the parties' briefing and argument and found in favor of the City. *Id.* Denying the Seskos' motion to extend time would not prevent a gross miscarriage of justice.

2. This is not the type of case of which the Supreme Court should accept review.

Even if the Seskos were able to show that extraordinary circumstances exist in this case and that granting an extension to file would prevent a gross miscarriage of justice, the Seskos would still have to show that this case is the type of case reviewable by the Supreme Court under RAP 13.4(b). The Seskos argue that this case "involves an issue of substantial public interest that should be determined by the Supreme Court." Seskos Motion at 7, quoting RAP 13.4(b)(4). However, in arguing that this is a case of exceptional circumstances, the Seskos admitted that "[f]ew, if any, cases will follow [our] fact pattern." Seskos Motion at 7. Therefore, this case does not really involve an issue of substantial public interest since so few cases, if any, would be affected by this Court's decision. Therefore, this not the type of the case that this Court should be reviewing.

F. CONCLUSION

The Court of Appeals did not commit obvious or probable error. Therefore, the Commissioner's Ruling Denying Review is correct, and this Court should deny the Seskos' motion to modify.

DATED this 25th day of November, 2008.

Respectfully Submitted,

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Mark E. Koontz, WSBA #26212
Attorney for Respondent City of
Bremerton

DECLARATION OF SERVICE

I am an assistant city attorney for the City of Bremerton. On the 25th day of November 2008, I caused a copy of Respondent City of Bremerton's Opposition to Petitioners' Motion to Modify Commissioner's Ruling to be served on:

Alan Middleton, Attorney for Petitioners
Davis Wright Tremaine LLP
1201 Third Avenue, Ste 2200
Seattle, WA 98101-3045

by United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Bremerton, Washington this 25th day of November 2008.

_____
Mark E. Koontz